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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

R. E. RAY and SADIE RAY, His Wife,
Petitioners,

vs.

STATE HIGHWAY COMMISSION OF KANSAS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of the State of Kansas.

OPINIONS BELOW

The opinion of the District Court of Shawnee County, Kansas, entered September 28, 1964, is not reported and is evidenced by a letter from the District Judge, clarifying letters from counsel for the respective parties and a Journal Entry of Summary Judgment (Appendix A, *infra*, pp. A1). The opinion of the Supreme Court of the State of Kansas entered January 22, 1966, is reported at 196 Kan. 13, 410 P.2d 278 (Apepndix A, *infra*, pp. A7).

JURISDICTION

The decision of the Supreme Court of the State of Kansas was dated and entered January 22, 1966. Petition for Rehearing, timely filed, was denied by order dated and entered February 23, 1966. The jurisdiction of the court is invoked under 28 U.S.C. §1257(3), since rights, privileges and immunities have been specially set up and claimed under the United States Constitution.

QUESTIONS PRESENTED

1. May the State Highway Commission of Kansas, under the guise of police power, take the petitioners' right of direct access to an existing highway without condemnation and without the payment of just compensation and without the exercise of procedural due process?

2. Where the state legislature of the state has provided a procedure for the obtaining of access rights by gift, devise, purchase or condemnation, may the State Highway Commission administratively determine to ignore the applicable statutes and take petitioners' right of direct access to an existing highway without the payment of compensation and without the exercise of procedural due process?

3. If the State Highway Commission of the State of Kansas has been properly held to have the power to take petitioners' right of direct access to an existing highway without the payment of just compensation, can such power be exercised administratively and summarily without the establishment and maintenance of a procedure providing for procedural due process?

4. If the State Highway Commission of the State of Kansas is held to have the power and right by the exercise of police power to take direct access rights and not to compensate for damages if the abutting property owner is left with reasonable indirect access, can such power and right be exercised without a procedurally proper determination of reasonableness and an opportunity to have a judicial determination of reasonableness by a jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved in this case are as follows:

United States Constitution, Amendment XIV:

> "§1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Statutes of the State of Kansas involved are K.S.A. 68-1901 to 68-1906, inclusive. These statutes are set out in full in Appendix B to this Petition. Of particular significance, however, is K.S.A. 68-1903, as follows:

> "*Acquisition of property and property rights.* The highway authorities, jointly or severally, may acquire the desired private or public property, including rights of access, light, air or view for controlled access facilities, by gift, devise, purchase or condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, roads and streets within their respective jurisdictions. [L. 1953, ch. 307, §3; April 2.]"

STATEMENT

The petitioners, husband and wife, now own and at all times material have owned real property on the north side of U.S. Highway 54 west of the City of Wichita, Kansas, in its urban area. The land was platted, but undeveloped valuable commercial property. In 1953 the State Highway Commission of Kansas had built a divided concrete four-lane highway abutting the entire south boundary of petitioners' land. The Highway Commission had previously in 1952 condemned the right of way, but no attempt had been made to condemn access rights and the condemnation action was before the Highway Commission secured the power to condemn access by the statutes now known as K.S.A. 68-1901 to 1906, inclusive (Appendix B). Although the physical construction of driveways from the land to the highway was, as is customary, waiting the actual commercial development of the land, the landowners for some six years after the construction of the highway in 1953 had and enjoyed free, unlimited and unrestricted direct access to the highway.

In 1959, without condemnation of access rights and without affording petitioners an opportunity to be heard on the extent of damage to petitioners' property or the reasonableness of proposed indirect access, and without any hearing or determination of necessity, the State Highway Commission of the State of Kansas built on its right of way a service or frontage road across the entire south boundary of landowners' property. This was built between the existing highway and the petitioners' property and it served as a permanent barrier eliminating and preventing direct access from the highway to said commercial property. The length of frontage of petitioners' property is 197.88 feet. There are no entrances or points of connection at any point along the frontage of petitioners' property with the main travelled portion of the highway. The points of connection between the frontage road and the main travelled portion of the highway at the time of the argument of this case to the Kansas Supreme Court were 1,067.44 feet apart. The one to the east of petitioners' property being 155.56 feet east of the east boundary of petitioners' property and the one to the west being 714 feet west of the west boundary of petitioners' property. (The above mentioned measurements were not before the District Court when it rendered summary judgment against petitioners and were only brought out on second argument of this case before the Supreme Court of Kansas.)

This frontage road to control access to existing Highway 54 was built without any condemnation at any time of the right of access and without the payment of any compensation. Thereafter petitioners brought action in the District Court of Shawnee County, Kansas, and, relying on past decisions of the Kansas Supreme Court, claimed the right to be compensated for the fair and reasonable value of the property rights taken by the State Highway Commission. Such petition specifically claimed:

"That the defendant has not instituted any action to condemn said property rights, but has appropriated said rights without due process of law and without payment of just compensation and without payment of any compensation. That said appropriation of said rights constitutes a taking of property rights in violation of the Laws of the State of Kansas and the Constitution of the United States." (Petition, Paragraph No. 6).

By amendment to the petition, petitioners alleged that the State Highway Commission had been engaged in the process of constructing and maintaining identical service roads on the same highway in the Wichita Metropolitan area after the taking of property rights identical to that involved herein by condemnation and payment of just compensation, but that the defendant Highway Commission "refused to afford these petitioners equal protection of the law, procedural due process and has failed, refused and neglected to make payment to these plaintiffs for the said taking of any compensation and has failed to make payment of just compensation." (Amendment to Petition, Paragraph No. 2). Defendant Highway Commission filed its answer claiming that the construction of the frontage road and the cutting off of direct access of petitioners was "to promote the public safety and welfare, to best serve the traffic along said highway, and in the exercise of its power to regulate and control highway traffic and access to highways. . . ." (Answer, Paragraph No. 5). At no time has the defendant Highway Commission claimed that the petitioners have not been damaged or that the petitioners' right of direct access to the main travelled portion of the highway has not been cut off. After the filing of the appropriate pleadings and certain requests for admission were obtained, but before the presentation of any evidence, defendant Highway Com-

mission filed a Motion for Summary Judgment which, on the 28th day of September, 1964, was sustained by the District Court on the ground that any control of access was within the police power properly exercised by the Highway Commission and that there was no compensable injury to the petitioners.

The matter was appealed to the Supreme Court of the State of Kansas and the petitioners again raised the questions of procedural due process, payment of just compensation and equal protection of the laws (Statement of Points Nos. 2, 3, 4 and 7 in the Supreme Court of the State of Kansas; also in Brief, Issues Presented Nos. 1, 2, 3, 4, 5 and 6). Subsequent to the filing of the record on appeal and the brief of these petitioners on appeal in the Kansas Supreme Court, that court issued an opinion in the case of *Brock* v. *State Highway Commission of Kansas,* 195 Kan. 361, 404 P.2d 934, which opinion stated a radical departure from the established law of Kansas in that it purported to lend a new statutory construction to Kansas Statutes K.S.A. 68-1901 to 1906, inclusive, substituted social and economic concepts for the judgment of the legislature and determined exercise of the police power and indirect access to be a question for the court rather than jury. Thereupon these petitioners filed a supplemental brief in which issues were presented in addition to those already mentioned above, as follows:

> "1. Shall the appellants' private property rights be appropriated without just compensation by deprivation by judicial legislation under the guise of statutory construction?
>
> "2. Shall appellants suffer the taking of private property rights by the substitution of social and economic concepts of the Supreme Court of Kansas for and in place of the considered judgment of the legislature of the State of Kansas?

"3. Shall the appellants be deprived of the right of trial by jury?"

Prior to the opinion of the Kansas Supreme Court in the Brock case and prior to the filing of petitioners' supplemental brief, the Supreme Court of Kansas had heard oral arguments in this case, but after the filing of the Brock decision, the court called for a new oral argument preparatory to which the petitioners filed the supplemental brief referred to above. After the second oral argument in the case, the Supreme Court of the State of Kansas issued its opinion which held that when a frontage road is provided to which the abutting owners of property have direct access and they have reasonable access from the abutting property via the frontage road to the through traffic lanes, the abutters' right of access has not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state and their damages, if any, are noncompensable. Further the court went on to hold that under the facts of record in this particular case the abutting property owners have reasonable access from their property to the controlled access highway and their rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state and their damages, if any, are noncompensable.

These petitioners filed a Motion for Rehearing and in said Motion for Rehearing petitioners reiterated their claim of violation of rights, privileges and immunities under the United States Constitution inter alia as follows:

"The opinion and decision of this Court in this matter has deprived these appellants of property and property rights without due process of law in violation of the

Fourteenth Amendment of the Constitution of the United States. The executive branch of the State of Kansas, acting through the State Highway Commission of Kansas, has taken vested rights of abutter's access of substantial value, owned by the appellants without condemnation and without following established legal procedures of any kind, and without just compensation; and this taking has now been confirmed by this Court."

* * *

"The thrust and effect of the trial Court summary judgment was that the Highway Commission, without limitation, can destroy property values and take valuable property rights without limitation or restriction, so long as the Highway Commission urges that the label 'police power' be applied to their act. This, a trial Court located some 150 miles away from the property in question, who cannot be presumed to have knowledge, or to have taken any judicial notice of the geography, surroundings, or circumstances of the property in question, without a trial and without the presentation of any evidence. Thus, the trial Court approves carte blanche power in the Highway Commission to take; without affording appellants a right to be heard, and a right to have their day in court in either administrative or judicial proceedings."

* * *

"As was pointed out in the appellants' amendment to petition, Record pg. 6, the State Highway Commission was and had been engaged in the process of constructing and maintaining frontage roads on the same highway under substantially identical circumstances, proceeding by condemnation and the payment in said cases of just compensation. The State Highway Commission of Kansas refused to condemn the rights here in question, and proceeded to take the right of access of the appellants—not by condemnation, but by appropriation. This Court is holding, in substance, that the existence of a landowner's rights may be determined by the whim of an administrative agency. The State Highway Com-

mission is to be required to pay just compensation when it condemns. It may take substantially identical rights by appropriation without payment of just compensation. This is the refusal to grant these appellants equal protection of the laws as required by the First (sic) Amendment of the Constitution of the United States."

* * *

"To finally deny to the citizens of Kansas the same constitutional protection of their private property rights is a denial to the citizens of Kansas and to these appellants, of equal protection of the laws, and a denial of a uniform construction and application of the United States Constitution."

On February 23, 1966, the Supreme Court of the State of Kansas overruled petitioners' Motion for Rehearing.

Petitioners' request that this court take jurisdiction of this case is for the purpose of determining the rights, privileges and immunities of these petitioners under the Constitution of the United States and more particularly, their rights to equal protection of the laws, payment of just compensation for property taken by administrative fiat of the State of Kansas, procedural due process and trial by jury.

REASONS FOR GRANTING THE WRIT

I

As the number of motor vehicles increases, our population becomes more mobile and more free time leads to increased highway travel, the emphasis on major highways has swung from the land service highway to the concept of the super non-access interstate highway at the other extreme and the hybrid version of the super highway which is characterized by the local service or frontage road separated from the high speed traffic lanes. Perhaps

no concept in transportation history has engendered such a flood of litigation and diversity of results as the concept of "indirect access" to an existing highway. The petitioners believe that the time has come for this court to express for the guidance of all its interpretation of the safeguards and rights guaranteed to the citizens of the several states, as these relate to the valuable property right known as direct access rights.

As Justice Schroeder pointed out in his dissent in the case of *Brock* v. *State Highway Commission, supra,* 195 Kan. 361, 377:

> "Cases in other jurisdictions as to whether the landowners of property abutting a frontage road should be compensated or not for loss of direct access fall into three major categories:
>
> (1) Any loss resulting from being placed on a frontage road should be compensated in eminent domain, but the existence of the frontage road should be considered in mitigation of the loss suffered.
>
> (2) Any loss resulting from being placed on a frontage road should be compensated in eminent domain only where accompanied by an otherwise compensable taking of land, and the existence of a frontage road should be considered in mitigation of the loss suffered in those cases.
>
> (3) Any loss resulting from being placed on the frontage road should not be compensated in eminent domain whether land is taken or not.

The court in the instant case has done an about-face by jumping from position No. 1 (supported in *Franks* v. *State Highway Commission, supra*; *Atkinson* v. *State Highway Commission, supra*; and *Smith* v. *State Highway Commission, supra*) to position

No. 3, subject, however, to the qualification that the restriction of access to the abutting property owner by the State Highway Commission must be reasonable. This switch has been accomplished in spite of a statute which defines the state's policy on frontage roads."

Cases relating to each of the above three described concepts can be found in the Annotation 43 A.L.R. 2d 1072, 1077-1079, and A.L.R. 2d Later Case Service, Vol. 4, pp. 904-909.

Examples of cases recognizing the right of direct access as a constitutionally protected right (often called the majority rule) are:

People v. *Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799;
State v. *Thelberg*, 87 Ariz. 318, 350 P.2d 988;
State v. *Geiger & Peters, Inc.*, (Ind.) 196 N.E.2d 740;
Balog v. *State Dept. of Roads*, 177 Neb. 826, 131 N.W.2d 402.

An example of a case seeming to recognize the preeminence of the "police power" over the right of direct access is:

Nick v. *State Highway Com.*, 13 Wis. 2d 511, 109 N.W.2d 711.

A reading of all of the cases of the various states discloses that invariably the constitutional prohibition against taking of property without just compensation and the requirement of due process is constantly being urged on the highest courts of the various states with reference to these access cases and continually the highest courts of these states are ruling one way or the other on these substantial questions arising under the Constitution of the United States. It would serve no useful purpose at this stage

of this litigation to set out the extended arguments on both sides of the question and the various reasonings of the courts in arriving at their very diverse conclusions. If the petitioners' writ is granted, such arguments and reasoning will be fully presented to this court. Suffice it to say at this time that on the particular questions involved here the citizens of the various states are being dealt with in a variety of ways, denied compensation in many courts, allowed compensation in other courts, furnished some procedural relief in other courts, completely denied even the barest of procedural hearing in other courts, and all of these various diverse treatments being rendered under the cloak of answering the question as to whether or not the U. S. Constitutional protections of due process, just compensation and equal protection of the laws grant a right and a remedy with regard to the taking of direct access to an existing highway.

Even the Kansas Supreme Court recognized the frustration of attempting to coordinate the various opinions of the several states when in *Brock* v. *State Highway Commission, supra,* 195 Kan. at page 369 the court said:

> "The courts have been in disagreement as to what constitutes undue limitations or unreasonable interference with the rights of an abutting owner. They are in even a more hopeless conflict when it comes to applying the doctrine to controlled access highways. The courts of the various jurisdictions, including our own, are not only in conflict but the judges constituting the various courts are in disagreement. It is difficult to find an opinion on the matter which is not accompanied by concurring and dissenting opinions."

This court can render a great service to the orderly administration of our judicial system in this country by taking jurisdiction of this case which squarely raises the

federal constitutional questions involved and putting to rest once and for all the indecisiveness, contradictions and unequal treatment currently afforded by the numerous decisions of the various states. As Justice Douglas said in his dissenting opinion in *Martin* v. *Creasy*, 360 U.S. 219, 227, 79 S. Ct. 1034, 1038-1039, 3 L. Ed. 2d 1186:

> "We have at bottom in this case a question whether access to a highway is a property right which is compensable under the Fifth and Fourteenth Amendments. If it is compensable, as the District Court ruled, see 160 F. Supp. 404, 410-412, this is the most appropriate time to make the announcement. Particularly is this so when appellees in this case sought a declaration by the state court of their rights under the statute and were told that 'their constitutional rights, whatever they may be, will be guarded and protected.' Such a ruling by the District Court would not halt the highway program. *But it might have an effect on engineering designs for new local service roads to provide substitute means of access to the highways; and it would make clear to the local authorities what the scope of their financial commitments in the undertaking is.*" (Emphasis supplied).

Justice cannot be served by delaying a decision of this important question any longer, even if the final determination of such question should be adverse to the contentions of these petitioners. Further delay will result in further indecision and ludicrous results.

II

The anomaly in this particular case, so far as the action of the Kansas Supreme Court is concerned, is the fact that in December of 1957 the Kansas Supreme Court construed the Kansas statutes in *Franks* v. *State Highway Commission*, 182 Kan. 131, 319 P.2d 535, holding that a landowner comparably situated could by injunction pro-

hibit the Highway Commission from limiting or controlling the landowners' rights of access to an existing highway and finding that an attempt by the State Highway Commission to limit and control access without condemnation was repugnant to the said statute. Thereafter, in *Atkinson* v. *State Highway Commission*, 184 Kan. 658, 339 P.2d 334, the Kansas Supreme Court again specifically held that the powers granted by the statute prohibited the limitation of direct access without condemnation and just compensation unless access rights were acquired as specified by the statute by gift, devise or purchase. The court there further specifically held that the legislature did not put any limit on the amount of access required to be taken before the Commission must resort to condemnation, if not acquired by gift, devise or purchase, and it held specifically that the limitation of direct access was a taking that required just compensation. The Atkinson opinion was filed by the Kansas Supreme Court on May 16, 1959, less than a month before the taking involved herein. There can be no doubt that at the time of the taking in this case the petitioners herein under the rulings of the Kansas Supreme Court owned valuable property rights and right of access. This valuable right of access has a common law origin and it was recognized by legislative sanction and protection and judicial recognition.

The police power argument made by the State Highway Commission in the court below and adopted by the Kansas Supreme Court had previously been specifically rejected in *Smith* v. *State Highway Commission*, 185 Kan. 445, 346 P.2d 259. Thereafter, however, and while this case was pending on appeal in the Kansas Supreme Court that court decided the case of *Brock* v. *State Highway Commission*, *supra*, 195 Kan. 361, 404 P.2d 934. In the Brock case the Kansas Supreme Court stated that the Franks and

Atkinson decisions "did not recognize the new concept of controlled access highways. They are contrary to the law as expressed in this opinion, and are therefore overruled." (195 Kan. at page 372). The court specifically rejected its previous reasoning, stating that the Highway Commission could elect to exercise its police power rather than the power of condemnation and upheld the taking of direct access in the Brock case. Upon entry of the Brock opinion, the Kansas Supreme Court in this case asked for new arguments which were held. The pertinent point is that at the time of the original commencement of this action petitioners in the state of Kansas were recognized to have common law property rights protected by specific legislation and long judicially recognized by the Kansas Supreme Court, and at least at that time were property rights which, under the United States Constitution, could not be taken without due process of law and payment of just compensation. By the subsequent decision by the Kansas Supreme Court in this case, however, the court specifically endorsed the proposition that by administrative action without administrative hearing, by the exercise of power rather than right, by trial court judicial fiat without a trial either to a court or a jury, the property rights theretofore recognized could be appropriated without the payment of any compensation.

Justice Schroeder in his dissenting opinion in *Brock* v. *State Highway Commission, supra,* 195 Kan. at page 378, stated:

> "The Kansas legislature in 1953 enacted the controlled access facility statute to enable such highways in Kansas. On a factual situation substantially the same as the instant case, this court in *Franks* v. *State Highway Commission, supra,* in December, 1957, construed the statute for the first time. It was elucidated in

Atkinson v. *State Highway Commission, supra,* and broadened in *Smith* v. *State Highway Commission, supra.* The access the court was speaking of in these cases was direct access to the main traveled portion of the highway. This construction of the statute—mandatorily requiring the acquisition of property rights, including the right of access of an abutting property owner, to establish a controlled access facility—has stood for over seven years and the legislature has not seen fit to change it. *Under these circumstances it must be assumed the legislature has approved such construction placed upon the statute by the court. The authorities on statutory construction so holding are legion.*" (Emphasis supplied).

The Kansas statute, K.S.A. 68-1903, provides as follows:

"Acquisition of property and property rights. The Highway authorities, jointly or severally, may acquire the desired private or public property, including rights of access, light, air or view for controlled access facilities, by gift, devise, purchase or condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, roads and streets within their respective jurisdictions. [L. 1953, ch. 307, § 3; April 2]."

(See remainder of K.S.A. 68-1901 to 1906, inclusive, in Appendix B.)

In dealing with that particular statute the majority of the Kansas Supreme Court in *Brock* v. *State Highway Commission, supra,* 195 Kan. at page 369, stated:

"The appellants vigorously contend that the controlled access facilities statute (K.S.A. 68-1901, et seq.) is a mandatory provision requiring condemnation and payment of damages when access rights are restricted. We do not agree with this construction. The statute in no way attempted to restrict the state's existing right to control access under the police power."

It is to be noted that the Kansas Supreme Court does not say that the State Highway Commission has been given the specific right to exercise its police power without payment of compensation or other specified acquisition. The court could not say this for the reason that the statutes which authorize the setting up of frontage roads and the taking of indirect access provide certain exclusive methods by which this can be accomplished and none of these methods were followed in this particular case.

Thus, we are not dealing here with a clear legislative exercise of the police power as there was in *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93. As the court said there, 372 U.S. at page 728, "Under the system of government created by our constitution it is up to the legislatures, not courts to decide on the wisdom and utility of legislation." In this case the legislature of the State of Kansas has never authorized the exercise of the police power to the exclusion of the methods of acquiring access specifically enumerated in the above cited statute. What the Kansas Highway Commission and the Kansas Supreme Court have done in this case is "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws," which is exactly what this court said could not be done in *Ferguson* v. *Skrupa*, *supra*.

We do not believe that under these circumstances this court can put its stamp of approval on the action of the Kansas Highway Commission and the Kansas Supreme Court which have attempted to wipe out these petitioners' constitutionally protected rights by setting up the so-called "police power" which has no legislative basis.

III

Apparently the Safety Department of the Kansas Highway Commission made a study and recommendation to support the construction of the frontage road about which petitioners are complaining, but the record does not contain any evidence or indication that, the State Highway Commission itself at any time made any designation of U. S. Highway 54 in the area in question as a limited and controlled access facility. It acted unilaterally without following the procedures required by K.S.A. 68-1902.

Thus, regardless of whether the legislature could authorize exercise of the police power resulting in the denial of direct access to petitioners without compensation and regardless of whether or not the State Highway Commission would have the power to exercise such police power even in the absence of enabling legislation, there is a genuine question under the circumstances of this case as to whether or not the petitioners have been afforded procedural due process. There is no indication in the record here that any type of procedure for a determination of the necessities of the situation and the solutions thereto has been prescribed by the State Highway Commission or that any such procedures have actually been maintained and carried out. Surely the due process clause of the United States Constitution affords these petitioners at least the right to such procedural due process.

Furthermore, as pleaded by the petitioners in their Amendment to Petition, the State Highway Commission was and had been engaged in the process of constructing and maintaining frontage roads on the same highway under substantially identical circumstances proceeding by condemnation and the payment in said cases of just compensation. The Highway Commission, acting in a sum-

mary administrative manner, refused to condemn the rights herein questioned and proceeded to take the petitioners' right of direct access not by condemnation, but by appropriation. The effect of the decision of the Kansas Supreme Court is that the existence of a landowner's rights may be determined by the whim of an administrative agency without any procedure for a determination of the facts and the procedure to be followed.

The parties affected by the determination of an administrative body are entitled to insist upon compliance with the requirements of due process (*Shields* v. *Utah Idaho C. R. Co.*, 305 U.S. 177, 59 S. Ct. 160).

Procedure of administrative tribunals must observe the fundamentals of fair play, which require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion (*Federal Communications Com.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437).

In administrative proceedings of a quasi judicial character the liberty and property of the citizen must be protected by the rudimentary requirements of fair play (*Morgan* v. *United States*, 304 U.S. 1, 58 S. Ct. 773). In the last cited case the court laid down the requirements of administrative procedural due process and the reasons therefor in the following succinct statement:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' es-

sential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" (*Morgan* v. *United States*, *supra*, 304 U.S. at pages 14-15, 58 S. Ct. at page 775).

IV

The trial court in this case entered summary judgment solely on the basis of the pleadings in the case and the request for admissions which have been filed by the State Highway Commission and in entering such summary judgment the court made no determination as to whether or not the taking of access was reasonable, but entered a summary judgment which stated in effect that any acts in the control of access is within the police power exercised by the Highway Commission. There was no evidence before the court as to the nature, character, circumstances and terrain of the property or the uses to which it was adaptable. Further, there was no evidence as to what access, if any, would be granted to the main traveled portion of the highway. It was only upon second argument of the case in the Kansas Supreme Court that the points of connection at that time between the frontage road serving petitioners' property and the main traveled portion of the highway were shown. There is no evidence as to whether or not these points of connection will remain on a permanent basis or whether they are merely temporary. In short, there was no evidence on which a court could make any determination as to the extent of taking access rights and the reasonableness thereof. Even assuming the judgment and decision of the trial court and the Supreme Court of the State of Kansas to be correct in holding that this was a proper exercise of the police power, the question of reasonableness still must be determined by the court. The classic statement

of the rule is found in *Lawton* v. *Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385:

> "To justify the state in * * * interposing its authority in behalf of the public, it must appear—First, that the interests of the public * * * require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Citing the above rule, this court in *Goldblatt* v. *Town of Hempstead, New York*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, upheld an ordinance as a valid exercise of the police power of the city, but the court there said:

> "To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.
>
> "A careful examination of the record reveals a dearth of relevant evidence on these points. One fair inference arising from the evidence is that since a few holes had been burrowed under the fence surrounding the lake it might be attractive and dangerous to children. But there was no indication whether the lake as it stood was an actual danger to the public or whether deepening the lake would increase the danger. In terms of dollars or some other objective standard, there was no showing how much, if any thing, the imposition of the ordinance would cost the appellants. In short, the evidence produced is clearly indecisive on the reasonableness of prohibiting further excavation below the water table."

Thus, this court in the Goldblatt case simply held that upon the evidence adduced in the trial court the exercise of the police power was reasonable.

In the instant case the trial court gave petitioners absolutely no opportunity to be heard on the question of reasonableness. In fact, the trial court's decision appears to hold that as long as the denial of direct access constitutes an exercise of the police power, it makes no difference whether the access remaining to petitioners is reasonable or unreasonable. Consequently, petitioners had no opportunity to present evidence on this question. If this court fails should hold that petitioners' rights under the Constitution of the United States were not improperly taken if the exercise of the police power was reasonable, this court still must reverse this case and send it back to the lower court for a determination of reasonableness. Petitioners have pleaded a damage to their property in the amount of $30,000.00 and the fair inference from the pleadings is that the access remaining to the petitioners is unreasonable under all of the circumstances. There is nothing in the record here to justify the state in imposing its authority without payment of compensation and we respectfully submit that petitioners have been denied the right to trial by jury and due process as guaranteed by the 7th and 14th amendments to the United States Constitution.

CONCLUSION

We respectfully submit that the record in this case squarely presents for determination pressing federal questions which cry out for a hearing and decision by this court. For the reasons set forth above it is respectfully submitted that this petition for certiorari should be granted.

DONALD A. BELL,
830 First National Bank Building,
Wichita, Kansas 67202,

CHARLES W. HARRIS,
830 First National Bank Building,
Wichita, Kansas 67202,

Attorneys for Petitioners.

APPENDIX A

Decision of the District Court

Beryl R. Johnson
Judge of Division One
Third Judicial District of Kansas
Topeka, Kansas

Gladys Joseph, CSR
Official Reporter

September 28, 1964.

Fisher, Patterson, Sayler and Summers,
Attorneys, Topeka, Kansas.
Mr. Chas. W. Harris, Attorney,
Wichita, Kansas.
Mr. Chas. N. Henson, Attorney,
State Highway, Topeka, Kansas.

In re: RAY v STATE HIGHWAY 89408

Gentlemen:

I have carefully studied the pleadings in this case together with oral and written arguments in connection with the motion of defendant for summary judgment.

The construction of the frontage road was part of the original condemnation proceedings and entirely within the limits of the lands acquired thereby. The frontage road is accessible from all points of plaintiffs' property. By means of the frontage road plaintiffs are given access to the high speed traffic lanes of U. S. Highway 54. The control of access to high speed traffic lanes is well within the police power properly exercised by the Highway Commission reg-

ulating traffic for a higher degree of safety. There is no compensable injury to plaintiffs.

There being no material issue of fact between the litigants the moving party is entitled to judgment as a matter of law.

Judgment is for the defendant for its costs. Counsel for defendant will please prepare proper journal entry, giving it the date of this letter.

Yours very truly,

/s/ Beryl R. Johnson
Judge.

BRJ-GJ
cc-Clerk of The District Court

September 29, 1964

The Honorable Beryl R. Johnson, Judge
District Court of Shawnee County, Kansas
County Court House
Topeka, Kansas

Re: Ray vs. State Highway Commission
89408

Dear Judge Johnson:

Don Patterson and I in discussing your letter decision of September 28, 1964, in the above matter, agreed that the first phrase of the second paragraph, which reads "The construction of the frontage road was part of the original condemnation proceedings" is factually in error and not supported by the record. Don indicated that he would visit with you about it. I would suggest that you write an amended letter decision with a copy to the clerk which would supersede your original letter opinion merely deleting the said phrase. On the other hand, if you feel that your decision was based on an understanding that the construction was part of the original condemnation proceedings and that

this is necessary to the decision you reached, we would be happy to come to Topeka for further argument of the matter.

By a copy of this letter to Don Patterson, I ask that he advise you and us of his position in respect to this so that the record may be clarified.

Very truly yours,

/s/ Charles W. Harris
of Weigand Curfman Brainerd
Harris & Kaufman

CWH:blm
cc: Mr. Don Patterson
Fisher, Patterson, Sayler and Summers
816 First National Bank Building
Topeka, Kansas

Law Offices of
Fisher, Patterson, Sayler & Summers
First National Bank Building
Topeka, Kansas 66603
Area Code 913 FLanders 4-8543

David H. Fisher
Donald Patterson
C. Keith Sayler
Jack L. Summers
Edwin Dudley Smith

Irwin Snattinger
Counsel

October 5, 1964

Mr. Charles Harris
Weigand, Curfman, Brainerd, Harris & Kaufman
Attorneys at Law
830 First National Bank Building
Wichita, Kansas

Re: Jones vs. State Highway Comm. of Kansas

Dear Mr. Harris:

This will acknowledge receipt of a carbon copy of your letter to Judge Johnson of September 29, 1964 that followed

up our previous telephone conversation of September 28, 1964.

I am enclosing an original and one carbon copy of a journal entry in each case. In the Ray case, I attempted to state the findings, following the Judge's letter, but I incorporated the correction you and I discussed at that time.

If these meet with your approval, please sign them, and return them, and I will discuss them with Judge Johnson at the time he signs them.

Sincerely yours,

/s/ Donald Patterson
Donald Patterson

DP/hg
Encl.

October 7, 1964

Lucile M. Carter
Clerk of the District Court
of Shawnee County, Kansas
County Court House
Topeka, Kansas

Re: Ray vs. State Highway Commission
89408

Dear Miss Carter:

We enclose herewith a journal entry entering summary judgment in the above matter. We would appreciate it if you would secure Judge Johnson's approval of the journal entry and then file the said document. In connection with this, by the agreement of counsel for the State Highway Commission and ourselves, we enclose herewith copy of a letter of the undersigned to Judge Johnson dated September 29, 1964, and a copy of a letter from Donald Patterson

to Charles Harris dated October 5, 1964, which are for the purpose of clarifying the letter decision of the court entered on September 28, 1964. We ask that you file copies of these letters in the court file itself.

Very truly yours,

/s/ Charles W. Harris
of Weigand Curfman Brainerd
Harris & Kaufman

CWH:blm
Enclosures
cc: The Honorable Beryl R. Johnson
Charles N. Henson
Donald Patterson

Summary Judgment

On this 22nd day of June, 1964, the above entitled cause came before the court for pre-trial conference and on defendant's motion for summary judgment. The plaintiffs appeared by their attorney, Charles W. Harris. The defendant appeared by its attorneys, Charles N. Henson and Donald Patterson.

Thereupon, certain exhibits were marked, identified and received into evidence by the court, as shown by the reporter's notes. Thereupon, the motion for summary judgment of the defendant was argued to the court by counsel for both parties, and consideration of said motion was taken under advisement.

On this 28th day of September, 1964, the court having considered the arguments of counsel for both parties, and having studied the pleadings, admissions on file and exhibits received into evidence at the pre-trial conference, finds as follows:

1. The construction of the frontage road in question was located entirely within the boundary of the easement condemned for right-of-way purposes as described by defendant's request for admission No. 1 and No. 5.

2. The frontage road is accessible from all points where the north edge of the frontage road is adjacent to plaintiffs' property.

3. By means of the frontage road plaintiffs are given access to the high speed traffic lanes of U. S. Highway 54.

4. The control of access to high speed traffic lanes is well within the police power properly exercised by the Highway Commission regulating traffic for a higher degree of safety.

5. The construction of the frontage road as disclosed by the exhibits, pleadings and admissions on file, fail to show any compensable injury to plaintiffs resulting from the construction of the frontage road.

The court further finds that the pleadings, exhibits received into evidence and admissions on file fail to show that there is any genuine issue as to any material fact between the parties, and the defendant is entitled to summary judgment as a matter of law.

It Is Therefore Ordered, that defendant should have, and is hereby granted judgment in its favor against the plaintiffs, and the costs herein should be and are hereby assessed to the plaintiffs.

Decision of the Kansas Supreme Court

No. 44,137

R. E. Ray and Sadie Ray, his wife, *Appellants*, v.
State Highway Commission of Kansas,
Appellee.

Syllabus by the Court

1. Highway—*Extent of Property Owner's Right of Access—Controlled Access Facilities—Reasonable Access—Police Powers—Damages Non-compensable.* The right of access of an abutting property owner upon a public street or highway is merely a right to reasonable, but not unlimited, access to and from the abutting property. As applied to controlled access facilities, where a frontage road is provided, to which the abutting owners of property have direct access, and they have *reasonable access* from the abutting property via the frontage road to the through-traffic lanes of the controlled access highway, the abutters' rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state, and their damages, if any, are non-compensable.

2. Same—*Access Rights Provided—Reasonable Access to Controlled Access Highway—Access Rights Subject to Regulation Under Police Powers—Damages Non-compensable.* Where a frontage road, which is a part of the highway system, provides owners of abutting land with access to the westbound through-traffic lanes at points of connection, only 1,067.44 feet apart, one being 155.56 feet east of the east boundary and the other being 714 feet west of the west boundary of the appellants' property, it is *held*: The abutting property owners have reasonable access from their property to the controlled access highway, and their rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regula-

tion under the police power of the state, and their damages, if any, are non-compensable.

Appeal from Shawnee district court, division No. 1; Beryl R. Johnson, judge. Opinion filed January 22, 1966. Affirmed.

Charles W. Harris, of Wichita, argued the cause, and *Lawrence Weigand, Lawrence E. Curfman, Byron Brainerd, Orval J. Kaufman, J. Ruse McCarthy, Donald A. Bell, J. L. Weigand, Jr., Spencer L. Depew, Paul M. Buchanan* and *Charles R. Moberly*, all of Wichita, were with him on the brief for the appellants.

Charles N. Henson, Assistant Attorney General, argued the cause, and *David H. Fisher, Donald Patterson, C. K. Saylor, Jack L. Summers* and *Edwin D. Smith*, all of Topeka, were with him on the brief for the appellee.

The opinion of the court was delivered by

Schroeder, J.: This is an action by landowners to recover damages on an implied contract for the value of property rights alleged to have been appropriated by the State Highway Commission without condemnation and without the payment of just compensation. The landowners allege the State Highway Commission has unlawfully taken their right of direct access to U. S. Highway No. 54. Upon the pleadings and admissions of the parties the trial court entered summary judgment for the State Highway Commission on the ground there was no compensable taking of the landowners' right of access. The landowners have duly perfected an appeal.

The only question is whether under the facts of this case there was a compensable taking of the landowners' rights of access to U. S. Highway No. 54.

It is the position of the State Highway Commission (hereafter referred to as the Commission) that upon the pleadings and admitted facts (secured by the Commission pursuant to K.S.A. 60-236) concerning which there is no dispute, the trial court properly sustained the motion for summary judgment as a matter of law.

The facts upon which the issue herein is to be determined are as follows:

The appellants, husband and wife, now own and at all times material to this action have owned real property on the north side of U. S. Highway No. 54 west of the city of Wichita, but in the urban area. The land was platted but is undeveloped commercial property. In the year 1952 the Commission condemned in the name of the State of Kansas an easement for a highway right of way over a portion of the appellants' property, the description of which has been admitted. (Abutters' rights of access were not condemned.)

In 1953 the Commission constructed a divided concrete four-lane highway, with separated eastbound and westbound traffic lanes, which was designated as U. S. Highway No. 54, a part of the state highway system. This highway abutted the entire south boundary of the appellants' land, and was constructed wholly within the easement previously condemned.

In the year 1959 the Commission constructed as a part of U. S. Highway No. 54, and the state highway system, a frontage road at a location north of the westbound traffic lanes of U. S. Highway No. 54 adjacent to the appellants' property.

No portion of the aforesaid frontage road was situated on the appellants' property. It was located entirely within the easement condemned for highway purposes in 1952.

At all times since the construction of the aforesaid frontage road, the appellants have had and now have access to the frontage road, at all points where the north edge of this frontage road is adjacent to the appellants' property.

At all times material herein and subsequent to the construction of the frontage road, the appellants have had and now have access to the westbound traffic lanes only at points of connection between the frontage road and the westbound traffic lanes constructed in 1953.

It is undisputed the points of connection between the frontage road serving the appellants' property and the westbound traffic lanes are 1,067.44 feet apart. One is located 155.56 feet east of the east boundary of the appellants' property, and the other is located 714 feet west of the west boundary of the appellants' property. The appellants' property fronts the highway in question for a distance of 197.88 feet.

The Commission constructed the aforesaid frontage road for the purpose of making U. S. Highway No. 54 safer, less dangerous and for the welfare of the people, following a study and recommendation by its safety department.

As heretofore stated, the simple issue to be determined is whether upon the foregoing facts there was a compensable "taking" of the appellants' rights of access to the public highway. This is a question of law to be determined by the court in the first instance (*Brock* v. *State Highway Commission*, 195 Kan. 361, 404 P.2d 934).

The Commission contends that such action is a reasonable exercise of the police power in regulating traffic flow upon the main traveled portion of the highway.

It has been held if the State Highway Commission "takes" property for its lawful purpose without resort to condemnation or other proceeding, and a person deprived of property rights is not compensated, the injured party may bring an action against the Commission for full compensation in the form of an action on implied contract (*State Highway Comm.* v. *Puskarich,* 148 Kan. 388, 83 P.2d 132; *Atchison* v. *State Highway Comm.,* 161 Kan. 661, 171 P.2d 287; and *Dugger* v. *State Highway Commission,* 185 Kan. 317, 342 P.2d 186).

It has also been held that access to and from an existing public highway is one of the incidents of ownership of land abutting thereon, sometimes called a common law right of access, which may not be taken from the owner by the public without just compensation, when the landowner has been deprived of a legally protected right of access. Where the Commission exercises its power to take a legally protected right of access by condemnation or otherwise, the affected landowner has a right to compensation for the value of the property right taken. While the Commission concedes the foregoing law, it contends the cases so holding do not decide this case.

It is argued the power to regulate within the police power of the state gives the Commission the power to act in the public interest without incurring liability for compensation, even though property rights of citizens may be affected or even destroyed (Citing, *Smith* v. *State Highway Commission,* 185 Kan. 445, 346 P.2d 259, and cases cited therein).

It must be recognized that these two types of power which the Commission exercises are mutually exclusive polestars with different legal consequences. The use of one incurs liability for compensation, but the other does

not. An act by the Commission must be classified as an exercise of one type of power or the other. It cannot be both.

In the instant case the acts of the Commission, as revealed by the uncontroverted facts in the record, must therefore be held to be within the orbit of the power of eminent domain, or within the orbit of the police power to protect and safeguard the public welfare by regulating traffic on the highways. That is the issue presented by this appeal.

A similar question was brought into focus in *Smith* v. *State Highway Commission, supra,* as follows:

> "*Subject to constitutional limitations,* the state has absolute control over the streets and highways within its borders (*State* v. *Atkin,* 64 Kan. 174, 67 Pac. 519, 97 Am. S. R. 343, affirmed *Atkin* v. *Kansas,* 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148). Such power of supervision and control may be exercised directly by the legislature, or it may be delegated to a subordinate governmental agency.
>
> "The basic problem in every case involving impairment of the right of access is to reconcile the conflicting interests—*i.e.,* private v. public rights. The police power is the power of government to act in furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, *without incurring liability* for the resulting injury to private individuals (*Mugler* v. *Kansas,* 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 and *Schaake* v. *Dolley,* 85 Kan. 598, 118 Pac. 80, 37 L. R. A. [n.s.] 877). Eminent domain, on the other hand, is the power of the sovereign to take or damage private property for a public purpose *on payment of just compensation* (*Highbarger* v. *Milford, supra* [71 Kan.

331, 80 Pac. 633]; and *Simmons* v. *State Highway Commission, supra* [178 Kan. 26, 283 P.2d 392]).

"Since there is no doubt that the right of access, like any other property can be taken for public purpose under eminent domain upon payment of just compensation, the interesting question is how far the public can proceed under the police power. Determination of whether damages are compensable under eminent domain or noncompensable under the police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy in the eminent domain clause of insuring the individual against an *unreasonable loss* occasioned by the exercise of governmental power.

"It is well settled the limitation and regulation of *highway traffic* comes under the police power, and it makes no difference how or where any part of the traffic gained access to the road. The regulation of traffic without liability for the payment of compensation includes, among other things, prohibiting left turns, prescribing one-way traffic, prohibiting access or crossovers between separated traffic lanes, prohibiting or regulating parking, and restricting the speed, weight, size and character of vehicles allowed on certain highways.

"Where does the police power end the power of eminent domain begin? Some courts have attempted to generalize by declaring that the police power ends when the injury to the property owner in not being paid for his property is greater than the injury to the public in having to pay for the property (See, The Limited-Access Highway, 27 Wash. L. Rev., pp. 111-129; and Freeways and the Rights of Abutting

Owners, 3 Stanford L. Rev., pp. 298-311)" (pp. 453, 454).

In *Smith* the court held that compensation for taking access rights must be paid because the state there condemned the abutting landowners' rights of access in its eminent domain proceeding. On the facts in that case, there was no complaint by the landowners concerning that portion of their property abutting the highway where the State Highway Commission provided them with access to the highway via a frontage road. The issue concerned the taking by condemnation of 1410 feet of the abutters' rights of access which fronted existing U. S. Highway No. 36 where no frontage road was planned or provided.

On the facts the issue here presented was not decided in *Smith* v. *State Highway Commission, supra.*

The proposition of law here presented was given careful consideration by the court in *Brock* v. *State Highway Commission, supra.* There the position which this court had previously taken in *Franks* v. *State Highway Commission,* 182 Kan. 131, 319 P.2d 535, and in *Atkinson* v. *State Highway Commission,* 184 Kan. 658, 339 P.2d 334, was reconsidered, and these decisions were overruled. In *Brock* the court said:

> "Without entering into an extended discussion as to what does or does not constitute undue interference with access rights on a conventional or land-service highway we are forced to conclude that the doctrine granting a right of access to abutting landowners as developed for conventional or land-service highways does not have the same application to controlled access highways.
>
> * * *

"The appellants vigorously contend that the controlled access facilities statute (K.S.A. 68-1901, *et seq.*) is a mandatory provision requiring condemnation and payment of damages when access rights are restricted. We do not agree with this construction. The statute in no way attempted to restrict the state's existing right to control access under the police power. The act was no doubt intended to give the State Highway Commission authority by condemnation to take the right of access in its entirety. This could not be done under the police power. An owner of land abutting a highway could not be placed in a *cul-de-sac* under the case made law. This was the right that was extended by the controlled access facilities statute. Perhaps the chief design of the statute was to permit the State Highway Commission to meet the standards of the federal laws. It was more in the form of an enabling statute to meet the requirements of the federal Interstate and Defense Highway System. (23 U.S.C.A. § 101, *et seq.*) The standard adopted for the Interstate and Defense Highway System required that states be able to acquire access rights abutting thereon.

* * *

"We adhere to the rule that the owners of abutting lands have a right of access to the public road system *but it does not follow that they have a right of direct ingress and egress to and from a controlled access thoroughfare. The right of access,* if it can be determined to be a right under such circumstances *is the right to reasonable, but not unlimited, access to and from the abutting lands.*

"Although an abutting landowner has a right to use a highway he cannot be heard to say that he has been deprived of his right or compensably damaged because he does not have direct access to a certain highway where public judgment dictates that access to and from the highway should be controlled and is subject to control under the police power of the state." (pp. 369, 370) (Emphasis added).

The substance of the holding in *Brock* is that the right of access of an abutting property owner upon a public street or highway is merely a right to reasonable, but not unlimited, access to and from the abutting property. As applied to controlled access facilities, where a frontage road is provided to which the abutting owners of property have direct access, and they have *reasonable access* from the abutting property via the frontage road to the through-traffic lanes of the controlled access highway, the abutters' rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state, and their damages, if any, are non-compensable.

Where property owners are afforded complete ingress and egress to a frontage road upon which their property abuts, and they have *reasonable access* via the frontage road to the main traveled lanes of a controlled access highway, any inconvenience suffered by them is merely non-compensable circuity of travel. Under these circumstances, any decline that has occurred in the value of their property which is the result of a diversion of traffic is non-compensable. An abutting owner of property has no right to the continuation of a flow of traffic in front of his property.

In *Brock* a frontage road, which was a part of the highway system, provided the owners of land with access to the through-traffic lanes at points of connection, only 575 feet apart. This was held as a matter of law to be a reasonable regulation of traffic within the police power of the state, acting through the State Highway Commission, and access was not denied. There the landowners were granted access to the through-traffic lanes at the extremities of their property fronting the controlled access facility, and the State Highway Commission had constructed cross-over openings for their special use and benefit. Such cross-over openings

were only 575 feet apart and corresponded with the points of connection which the landowners had from the frontage road to the through-traffic lanes.

The question in the instant case therefore resolves into whether the points of connection between the frontage road serving the appellants' property and the westbound traffic lanes of U. S. Highway No. 54 provide the appellants with reasonable access from their abutting property to the through-traffic lanes of the controlled access facility. These points of connection are 1,067.44 feet apart. One using the westbound traffic lanes on this controlled access facility would be required to make an exit 155 feet east of the east boundary of the appellants' property onto the frontage road and thereby gain access to the appellants' property. In leaving the appellants' property one would be required to travel 714 feet west of the west boundary of the appellants' property on the frontage road and there enter upon the main traveled westbound traffic lanes.

Under these facts we hold as a matter of law the appellants have reasonable access from their abutting property to the through-traffic lanes of U. S. Highway No. 54. They are afforded complete ingress and egress from their abutting property to the frontage road, and reasonable access from their property via the frontage road to the through-traffic lanes of the controlled access facility. It follows that the abutters' rights of access have not been taken or appropriated by the Commission, but merely subjected to regulation under the police power of the state, and their damages, if any, are non-compensable.

The regulation of cross-over traffic between the east and westbound lanes of through-traffic on a controlled access facility is within the police power of the state (See, *Smith v. State Highway Commission, supra*).

The judgment of the lower court is affirmed.

Schroeder, J., dissenting: I must respectfully dissent on the ground the court has completely reversed its previous construction of the controlled access facilities statute (K.S.A. 68-1901 to 68-1906, inclusive) announced in *Smith* v. *State Highway Commission,* 185 Kan. 445, 346 P.2d 259. My reasons are fully set forth and may be found in my dissenting opinion in *Brock* v. *State Highway Commission,* 195 Kan. 361, 404 P.2d 934, at page 373.

Fontron, J. concurring: I concur in the court's decision that under the instant facts the access accorded plaintiffs to the main lanes of the highway via the frontage road can be said, as a matter of law, to be reasonable. However, as pointed out in my concurring opinion in *Brock* v. *State Highway Commission,* 195 Kan. 361, 378, 404 P.2d 934, it is my view that when reasonable minds might differ as to whether the limitation of access is reasonable, an issue of fact is presented which should be submitted to a jury.

Fatzer, J., concurring: This case was heard on its merits at the June, 1965 Session upon the facts admitted by the pleadings, and the admissions on file secured by defendant pursuant to K.S.A. 60-236. The only question presented is the legal effect of what in fact was done by the State Highway Commission in relation to plaintiffs' land. Those facts about which there is no dispute, and which control this case as a matter of law, are correctly stated in the court's opinion.

The plaintiffs' contention of denial of access to U. S. Highway 54 and for damages for a "taking" of their property right simmers down to the claim they are entitled to direct access to the main traveled portion of the westbound traffic lane for the entire frontage of their property. They refer to the frontage or service road constructed by the

commission in 1959 as a "barrier" to their right of access to the highway. No claim is made they do not have access to the frontage or service road adjacent to their property, or that circuity of travel to interchanges to the east and to the west of their property affording entrance to the main traveled westbound lane is unreasonable.

This case was decided by the district court several months prior to our decision in *Brock* v. *State Highway Commission,* 195 Kan. 361, 404 P.2d 934, and the district court held that the control of access to high-speed traffic lanes was within the police power of the state, properly exercised by the State Highway Commission regulating traffic for a higher degree of safety; that the construction of the frontage road as disclosed by the pleadings and admitted facts failed to show any compensable injury to the plaintiffs, and there being no genuine issue as to any material fact between the parties, the court entered summary judgment as a matter of law in favor of the commission.

In view of this court's decision in *Brock, supra,* holding that where an abutter is given unlimited access to a controlled-access highway by means of a frontage road, the reasonableness of commission action under the police power in requiring circuity of travel to reach other traffic lanes is a question of law reviewable by courts under existing facts and circumstances, this case was set for reargument at the December 1965 Session. The parties stipulated to the distances to interchanges east and west of plaintiffs' property affording entrance to the main traveled westbound traffic lane, which are correctly set forth in the court's opinion. The case was reheard on the merits and the plaintiffs filed a supplemental brief.

The point at issue is whether the plaintiffs suffered compensable injury by a "taking" of their right of access

to U. S. Highway 54. It is conceded that the commission acted pursuant to the provisions of our Controlled-Access Statute (K.S.A. 68-1901 *et seq.*) when it constructed the frontage or service road for the purpose of making the highway safer, less dangerous, and for the welfare of the traveling public, following a study and recommendation by the safety department of the commission. It is also conceded the commission did not condemn plaintiffs' right of access when it acquired the right of way for the highway in 1952.

Many basic legal questions arising out of the National System of Interstate and Defense Highways present the pressing problem of reconciling conflicting interests—that of private land use versus public highway use. Generally speaking, the backbone of this federal-state system is premised primarily upon the policy of access control. The two great powers of government involved—eminent domain and the police power—are antithetical; the line of demarcation between their valid exercise is not always well defined. (*Pumpelly* v. *Green Bay Company*, 80 U.S. 166, 20 L. Ed. 557). Eminent domain is the right *to take* private property for public use without the owner's consent upon payment of just compensation. On the other hand, the police power is the power of the state *to restrict* the use of property without paying compensation by a valid regulation intending to promote the public safety, health, morals and general welfare.

Application of our Controlled-Access Statute to fact situations produce legal questions of great magnitude relating to the restriction of access of abutting owners, frontage or service roads, new highways where none previously existed, and control of land use in interchange areas. In all these areas, the traditional police power may properly be exercised under the statute.

In applying the police power to solve some of these problems, courts should ask and answer the following questions. What is the police power? How is it exercised, and what are its limitations? What is an abutter's right of access, and may it be restricted by the police power? Can the two rights, the private right of the abutter and the right of the state to promote public safety, be harmonized? As Mr. Justice Burch stated in *State Highway Comm.* v. *Panhandle Eastern P. L. Co.*, 139 Kan. 185, 189, 29 P. 2d 1104, cases dealing with eminent domain must be put to one side.

The Police Power

The "police power," like the power of eminent domain, is an inherent power of the sovereignty and comes into being with the establishment of state government and continues as long as government endures. The term is not susceptible to definition with circumstantial precision and is subordinate to constitutional limitations. It is a governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury. It rests upon the fundamental principle that every owner holds his property under the implied limitation that its use may be so regulated as to not be injurious to the safety, health, morals and general welfare of the community in which he lives (*Panhandle Co.* v. *Highway Comm'n*, 294 U.S. 613, 79 L. Ed. 1090, 55 S. Ct. 563). The power extends to the entire property and business within a state's jurisdiction. Both are subject to it in proper cases (*Transportation Co.* v. *Chicago*, 99 U.S. 635, 642, 25 L. Ed. 336; *Hadacheck* v. *Los Angeles*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143, Anno. Cas. 1917B, 927; *Mugler* v. *Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273; *Schaake* v. *Dolley*, 85 Kan. 598, 118 Pac. 80, 37 L.R.A. [n.s.] 877; *Martin* v. *Davis*, 187 Kan. 473, 484, 357 P.2d 782, app. dis. 368 U.S. 25, 7 L. Ed. 2d 5, 82 S. Ct. 1).

The landmark case of *Mugler versus Kansas* clearly outlines the distinction between eminent domain and the police power. While every regulation necessarily speaks as a prohibition (*Goldblatt* v. *Hempstead,* 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987), and deprives the owner of some rights theretofore enjoyed and is in that sence an abridgment by the state of rights in property without compensation, a reasonable regulation imposed to protect public safety is not a "taking" in the constitutional sense (*Mugler* v. *Kansas, supra*), "because the public use is paramount and public safety is the desideratum." (*State Highway Comm.* v. *Panhandle Eastern P. L. Co., supra,* p. 189). The rule is stated: "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest." (*Chicago, Burlington & R'D* v. *Chicago,* 166 U.S. 226, 254, 255, 41 L. Ed. 979, 991, 17 S. Ct. 581; *Denver & R. G. R. R. Co.* v. *Denver,* 250 U.S. 241, 63 L. Ed. 958, 39 S. Ct. 450; *Mugler* v. *Kansas, supra*).

The property so restricted remains in the possession of the owner. The state does not appropriate it or make any use of it. It merely prevents the owner from making a use which interferes with the paramount right of the public safety previously ascertained by state action—in the instant case by the enactment of our Controlled-Access Statute and the design and construction of controlled-access U. S. Highway 54. If a regulation is otherwise a valid exercise of the state's police power, the fact that it deprives the property of its most beneficial use does not render it unconstitutional (*Walls* v. *Midland Carbon Co.,* 254 U.S. 300, 65 L. Ed. 276, 41 S. Ct. 118; *Reinman* v. *Little Rock,* 237 U.S. 171, 59 L. Ed. 900, 35 S. Ct. 511; *Mugler* v. *Kansas, supra, Goldblatt* v. *Hempstead, supra*). Nor is it of controlling significance

that the use prohibited is a "use" upon the soil as opposed to a "use" of the soil itself (*U. S.* v. *Central Eureka Mining Co.*, 357 U.S. 155, 2 L. Ed. 2d 1228, 78 S. Ct. 1097). Nor that the use prohibited is arguably not a common-law nuisance (*Reinman* v. *Little Rock, supra*).

Limitations of Police Power

Except for the familiar standard of "reasonableness," courts have generally refrained from declaring any specific area in which the police power may be invoked, but the classical statement of the rule in *Lawton* v. *Steele*, 152 U.S. 133, 38 L. Ed. 385, 14 S. Ct. 499 (1894), is still valid today, and I quote: ". . . To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. . . ." (p. 137). It seems trite to mention that action by the commission in designing and constructing a controlled-access highway, or in constructing frontage or service roads for such a highway pursuant to the statute, is action by the state within the meaning of this rule (*McCandliss Construction Co.* v. *Neosho County Comm'rs*, 132 Kan. 651, 653, 296 Pac. 720; *American Mut. Liability Ins. Co.* v. *State Highway Comm.*, 146 Kan. 239, 69 P.2d 1091). But state action in the form of regulation can be so onerous as to constitute a "taking" which constitutionally requires compensation (*Penna. Coal Co.* v. *Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158, 28 A.L.R. 1321). Hence, we come to the elusive question: Where does police power end and eminent domain begin? There is no precise answer to the question. Each case must be considered by courts on its own merits. If a line can be drawn between the exercise of these two powers, Mr. Justice Holmes, in *Penna. Coal Co.* v. *Mahon, supra*, had this to say:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.*" (p. 413).

* * *

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . *As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.* . . ." (p. 415) (Emphasis supplied).

In the recent *Goldblatt* case *Mugler* v. *Kansas* was quoted and reaffirmed, and it was said:

". . . There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co.* v. *Mahon, supra,* it is by no means conclusive, see *Hadacheck* v. *Sebastain, supra,* where a diminution in value from $800,000 to $60,000 was upheld. . . ." (p. 594).

See, also, *Erie R. R. Co.* v. *Public Util. Commrs,* 254 U.S. 394, 410, 65 L. Ed. 322, 333, 41 S. Ct. 169, where an expenditure of over $2,000,000 was required through the exercise of the police power to insure public safety.

The Public Safety

The supervision of public safety is a governmental power, continuing in its nature, to be exercised through the police power as the special exigencies of the moment may require, and the largest legislative discretion is allowed. We have held that the legislature has plenary power over highways and it is well settled that their use may be limited, controlled and regulated in the exercise of the police power whenever necessary to promote the safety and general welfare of the people. Hence, the regulation of traffic under the police power includes such things as prohibiting left turns, prescribing one-way traffic, prohibiting access or cross overs between separate traffic lanes, prohibiting or regulating parking, and restricting the speed, weight, size and character of vehicles allowed on certain highways (*State, ex rel.,* v. *St. Louis-S. F. Rly. Co.,* 124 Kan. 433, 260 Pac. 980; *State, ex rel.,* v. *State Commission of Revenue and Taxation,* 163 Kan. 240, 247, 181 P.2d 532; *Riddle* v. *State Highway Commission,* 184 Kan. 603, 611, 339 P.2d 301; *Moore* v. *State Highway Commission,* 191 Kan. 624, 383 P.2d 549; *Jones* v. *Garrett,* 192 Kan. 109, 386 P.2d 194; *Watson* v. *City of Topeka,* 194 Kan. 585, 589, 400 P.2d 689).

Our Controlled-Access Statute is, in the best sense, a police regulation deemed essential by the legislature for the protection of the lives and property of our citizens against the unrestrained exercise of any citizen of his own right. It was enacted to meet the needs of social and economic conditions brought about by twentieth century urbanization and the perfection and increased use of the motor vehicle. It calls for a necessary adjustment of two conflicting interests—that of the public using the highways, and that of the abutter and his right of access thereto. Generically, the safe use of the public highways represents the

more important interest of the two. This statute contains broad grants of power and was intended to embrace all details for the same, convenient and efficient movement of traffic. Its purpose was to have highways designed and constructed in such a manner that their use would not be dangerous to the traveling public. Old highways were to be relocated and reconstructed, and new highways were to be located and constructed. These highways were to be free from abutter's access except at designated interchange areas or crossovers, and were designed primarily to serve the traveling public and only secondarily the land over which they pass. The general grant of power to deal effectively with an enterprise of this magnitude in the interests of public safety is paramount, and the statute is not to be interpreted in any narrow, technical or illiberal manner.

This statute forms the basis for a different approach to the solution of questions concerning access rights than courts have had in some of their opinions. Heretofore they have approached the questions largely on the basis of individual interest alone. Under this statute properly applied, courts must now approach them on the basis of the convenience and safety of the people of the state without losing sight of the limited or restricted use the individual may make or has the right to make to access to such highways. Broad statements found in some opinions that under the common law an abutter has the absolute right of unrestricted ingress and egress to and from streets and highways must be modified to harmonize with the declaration of this statute. The change is an appropriate one for the legislature to make. As Mr. Chief Justice Harvey wrote in *State, ex rel.*, v. *Knapp*, 167 Kan. 546, 555, 207 P.2d 440, "Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others."

The Right of Access

The property right of access appurtenant to property abutting a public highway is the right of access to and from the abutting property by means of the street or highway (*Longnecker* v. *Railroad Co.*, 80 Kan. 413, 102 Pac. 492; *Riddle* v. *State Highway Commission, supra; Smith* v. *State Highway Commission,* 185 Kan. 445, 346 P.2d 259; *Moore* v. *State Highway Commission, supra*). The right has been given the status of property, which may not be "taken" from the owner without just compensation. It is justified upon the grounds of necessity and is such as is reasonably necessary for the enjoyment of the land, but the owner is not entitled, as against the public, to access to his land at all points between it and the highway. It is a judicially declared right, created and adopted by courts to conditions existing at the time of the judicial decisions (See, *Muhlker* v. *Harlem Railroad,* 197 U.S. 544, 49 L. Ed. 872, 25 S. Ct. 522). But conditions change, and the law follows apace.

But accepting the nature of the right of access as it is now recognized by most courts, its enjoyment, like all property rights, is subject to regulation by the state, where facts demonstrate its free and unrestricted exercise would be detrimental to public safety. The right of the abutter must bend to the right of the public to safe and efficient travel upon the public way. It is universally held that acts done in the proper exercise of governmental power and not directly encroaching upon private property, though these consequences may impair its use, do not constitute a "taking" within the meaning of the constitutional provisions, or entitle the owner to compensation from the state, or give him any cause of action (*Transportation Co.* v. *Chicago, supra*; *Goldblatt* v. *Hempstead, supra*; *Riddle* v. *State Highway Commission, supra*; *Moore* v. *State Highway Commis-*

sion, supra; Brock v. *State Highway Commission, supra;* 29 C.J.S. Eminent Domain, §111, pp. 919, 920).

Reconciling Conflicting Interests

How far the abutter's right of access must accommodate itself to the public need is the decisive question. Courts need not be reminded of the difficulty of stating a definite answer. They have placed the fulcrum at various points along the balance between the public need and the private right, but time does not permit a collection and citation of the numerous cases dealing with the subject. The presumption is in favor of the validity of the regulation and of administrative action under it, and the burden is upon the abutting owner to show that it was not necessary for the protection of the public safety (*Penna. Coal Co.* v. *Mahon, supra*; *Goldblatt* v. *Hempstead, supra*; *Erie R. R. Co.* v. *Public Util. Commrs., supra*).

No hard and fast rule can be stated, but courts must weigh the relative interests of the public and the individual and strike a just balance so that government will not be unduly restricted in its function for the public safety, while at the same time, give due effect to the policy of eminent domain to insure the individual against an *unreasonable* loss occasioned by the exercise of the police power (*Erie R. R. Co.* v. *Public Util. Commrs, supra*; *Riddle* v. *State Highway Commission, supra*; *Smith* v. *State Highway Commission, supra*). The question depends upon the particular facts of the case. Obviously, if there is a total blocking of access, the restriction would be unreasonable and the abutter entitled to compensation (*K.N. & D. Rly. Co.* v. *Cuykendall*, 42 Kan. 234, 21 Pac. 1051; *Sample* v. *Jefferson County*, 108 Kan. 498, 196 Pac. 440). Where, however, the restriction does not *substantially interfere* with the abutter's ingress and egress (*Iowa State Highway Comm.* v.

Smith, 248 Iowa 869, 877, 82 N.W.2d 755), or where "frontage" or "outer roadways" reasonably provide access (*Darnall et al.* v. *State et al.,* 79 S.D. 59, 108 N.W.2d 201; *Nick* v. *State Highway Comm.,* 13 Wis. 2d 511, 109 N.W.2d 71), the abutter is not entitled to compensation. While an abutter has the right of access to the public highway system, it does not follow that he has a direct-access right to the main traveled portion thereof; circuity of travel, so long as it is not unreasonable, is non-compensable (*State* v. *Lavasek,* 73 N.M. 33, 385 P.2d 361; *Sample* v. *Jefferson County, supra; Gantz* v. *Jefferson County Comm'rs,* 129 Kan. 66, 282 Pac. 265; *Brock* v. *State Highway Commission, supra*). Likewise, loss of business occasioned by the diversion of traffic is noncompensable (*Heller* v. *A. T. & S. F. Rld. Co.,* 28 Kan. 625).

In applying the foregoing rules, it will be noted the frontage road was constructed upon the right of way of U. S. Highway 54, which was acquired by eminent domain. Where, then, is the point at which the plaintiffs' access rights are to be determined? In the nature of things there can only be one point along which an abutter can claim access rights and that is the boundary line of the right of way of the highway. So far as the plaintiffs are concerned, everything outside or to the north of this line is private land including their own; and everything inside that line including the frontage or service road, is a part of the highway. Once they have crossed the boundary line they are, legally speaking, either within the highway or outside the highway, depending upon whether they are moving to or from their land when they cross the boundary line. When they are within the limits of the highway after crossing the boundary line, they must share with every other user of the highway the restrictions of turning and moving from lane to lane on the highway. The restriction of crossovers

between separated lanes of a public highway at designated points is within the police power of the state to regulate the flow of traffic upon the highway in the interest of public safety. It follows that when the plaintiffs as abutting owners are given access to the nearest lane of multilane U. S. Highway 54—the frontage or service road—and no claim is made that the circuity of travel to other traffic lanes is unreasonable, no property right has been "taken" which must be compensated by the state. Where property abutting a public highway with separated traffic lanes has unlimited access to the lane nearest the property constructed and maintained by the public authorities, whether called a frontage road or by some other name, access to and from the property by means of the highway is afforded and *the right of access is neither regulated nor taken.*

In view of the foregoing, and since the frontage road was constructed by the commission for the purpose of making U. S. Highway 54 safer, less dangerous, and for the welfare of the traveling public, following a study and recommendation by the safety department of the commission, neither the controlled-access statute nor the design and construction of multilane U. S. Highway 54, or under the record in this case, the construction of the frontage road to which the plaintiffs have direct access, constituted a "taking" of their property within the meaning of statutory and constitutional provisions, or entitle them to compensation from the state, or give them any cause of action for damages.

As previously indicated, the parties stipulated at reargument to distances to interchanges east and west of plaintiffs' property. It is 155.56 feet from the interchange east of their property to their east boundary line, and it is 714 feet from their west boundary line to the interchange west of their property. It is obvious the plaintiffs are not denied

ingress and egress to and from their property, and they may easily reach the main traveled westbound lane of the highway by passing over the frontage or service road. Where, as here, adequate provision is made for travel on frontage or service roads to interchange areas at not inconvenient distances, it cannot be said that the exercise of the police power through application of the statute (K.S.A. 68-1901 *et seq.*) imposes an unreasonable circuity of travel so as to authorize an award of damages to the abutting owner for a "taking" of his property. Moreover, courts may not substitute their judicial judgment for the judgment of the commission exercised as here, under a valid legislative act; rather, courts are obliged to find facts which demonstrate that the commission's conduct departs from the realm of the reasonableness and passes over into the realm of the unreasonableness—that it is arbitrary, capricious and subversive of private rights as to indicate an abuse rather than a *bona fide* exercise of power (*City of Emporia* v. *Railway Co.*, 88 Kan. 611, 614, 129 Pac. 161; *Spurgeon* v. *Board of Commissioners*, 181 Kan. 1008, 1014, 317 P.2d 798, and cases cited).

It has long been the rule in this state that the question whether an ordinance, regulation or statute, or acts of an administrative board or commission in pursuance thereof, is void because "unreasonable" is a question of law to be determined only by courts. In *City of Emporia* v. *Railway Co.*, 94 Kan. 718, 147 Pac. 1095, it was said:

> "Whether or not an ordinance is void because unreasonable is a question of law (*Lebanon* v. *Zanditon*, 75 Kan. 273, 89 Pac. 10), and in determining the question of reasonableness '"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether

> the [legislature or a city council] has transcended the limits of its authority' (*City of Lyons* v. *Cooper*, 39 Kan. 324, 328, 18 Pac. 296)" (l.c. 723).

In *Lebanon* v. *Zanditon*, 75 Kan. 273, 89 Pac. 10, it was said:

> "It is also contended that the court erred in refusing to submit to the jury for their consideration the evidence offered by the appellants tending to show that the ordinance was unjust and unreasonable. We cannot agree with the appellants in this contention. The facts being undisputed, the question whether an ordinance is void for any reason is a question of law and must be determined by the court (1 Dillon's Mun. Corp. § 327, and cases there cited)" (l.c. 275).

In *Miller* v. *State Board of Embalming*, 110 Kan. 135, 202 Pac. 619, it was said:

> "Not only must the courts meet and determine the question of the reasonableness of an official, administrative body, when such question is squarely presented, but it not infrequently has to determine the reasonableness of more formal enactments, such as city ordinances (*City of Emporia* v. *Railway Co.*, 94 Kan. 718, 722, 723, 147 Pac. 1095), and state laws (*The State* v. *Wilson*, 101 Kan. 789, 796, 799, 800, 168 Pac. 679)" (l.c. 141).

In *City of Marysville* v. *Cities Service Oil Co.*, 133 Kan. 692, 3 P.2d 1060, it was said:

> " 'The right to a judicial determination of the question of reasonableness, however, is the matter of essence and substance, and not the method of procedure; and so long as the defendant cannot be made to suffer until a competent court has passed upon the justice of the legislative rates the guaranties of the federal constitution are not infringed.' " (l.c. 701).

See, also, *Gilbert* v. *Mathews*, 186 Kan. 672, 352 P.2d 58.

It, therefore, follows that the question of the reasonableness of circuity of travel to reach interchanges of a multilane highway by means of frontage or service roads constructed by the commission as a part of the state highway system pursuant to the statute, affording an abutting owner access to other traffic lanes, is subject to review only by courts, as a matter of law. This necessarily follows since the point here involved is where regulation ends and a "taking" begins—that is, whether the police power has been properly invoked in restricting the use of the property, and if it has not, to require application of the law of eminent domain. This is a question of law for consideration of courts, and not a question of fact for consideration of juries.

I must disagree with Mr. Justice Schroeder's statement in his dissenting opinion that this court has done an about-face in construing K.S.A. 68-1903. Under no circumstances was that statute intended by the legislature to negate the authority of the commission to *restrict* the use of property by the exercise of the police power under Secs. 68-1901, 68-1902 and 68-1904, and K.S.A. Ch. 68, Art. 4 (*Moore* v. *State Highway Commission, supra*; *Riddle* v. *State Highway Commission, supra*). As previously indicated, in considering rights of access of abutting owners to controlled-access highways whose rights have been restricted by the commission's exercise of police power, cases dealing with eminent domain, such as *Smith* v. *State Highway Commission, supra,* must be put to one side, unless courts determine that what was done under the circumstances was a "taking" of the rights of the abutter which requires compensation by the state (K.S.A. 68-1903).

This court is eminently correct in affirming the judgment of the court below.

APPENDIX B

Applicable Kansas Statutes, K.S.A. 68-1901-1906, Inclusive

68-1901. Definitions. When used in this act:

(*a*) "A controlled access facility" means a highway, road or street especially designed to expedite and control through and local traffic, and over, from or to which highway, road or street, owners or occupants of abutting property shall have only a controlled right or easement of access, light, air or view. Such highways, roads or streets may be opened to use by all customary forms of street and highway traffic, or they may be parkways from which designated vehicles shall be excluded.

(*b*) "Highway authorities" means the state highway commission and the board of county commissioners of any county or governing body of any incorporated city acting individually or collectively.

(*c*) "Frontage road" means a highway, road or street which is auxiliary to and located on the side of another highway, road or street for service to abutting property and adjacent areas and for control of access to such other highway, road, or street [L. 1953, ch. 307, § 1; April 2].

68-1902. Authority to establish controlled access facilities. The state, county or city highway authorities, acting alone, or cooperating with each other or with any federal, state or local authority, or any other state, are hereby authorized to design, designate, establish, regulate, vacate, alter, improve, construct and maintain controlled access facilities wherever such highway authorities determine that traffic conditions, present or future, justify such facilities, and said highway authorities may regulate and restrict the use of such facilities by the various classes of vehicles or

traffic in a manner consistent with the purposes and provisions of this act. The highway authorities may so regulate, restrict or prohibit access to a controlled access facility so as to best serve the traffic for which such facility is intended [L. 1953, ch. 307, § 2; April 2].

68-1903. Acquisition of property and property rights. The highway authorities, jointly or severally, may acquire the desired private or public property, including rights of access, light, air or view for controlled access facilities, by gift, devise, purchase or condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, roads and streets within their respective jurisdictions [L. 1953, ch. 307, §3; April 2].

68-1904. New and existing facilities; grade crossing eliminations. The highway authorities may designate and establish controlled access highways as new and additional facilities, or an existing street or highway may be included within such facility, and they may provide for the elimination of intersections at grade with existing state or county roads and city streets or other public ways if the public interests shall be served thereby, but no city street, county road or state highway or other public way shall be opened into or connected with such controlled access facility without the consent of the highway authority having jurisdiction over such controlled access facility, and the respective highway authorities are hereby authorized to make all necessary agreements between themselves and the federal government as may be necessary to fully perform and fulfill the purposes and provisions of this act [L. 1953, ch. 307, § 4; April 2].

68-1905. Frontage roads. The highway authorities, in order to carry out the purposes and provisions of this act,

are authorized to design, designate, establish, regulate, vacate, alter, improve, construct, and maintain frontage roads and to exercise the same jurisdiction thereof as is authorized over controlled access facilities under this act, and such frontage roads shall be separated from the controlled access facility as may be deemed proper and necessary by the respective highway authorities [L. 1953, ch. 307, § 5; April 2].

68-1906. Unlawful use of controlled access facilities; penalties. It shall be unlawful for any person:

(1) To drive a vehicle over, upon or across any curb, central dividing section, or other separation or dividing line on controlled access facilities;

(2) to make a left turn or a semicircular or "U" turn except through an opening provided for that purpose in the dividing curb section, separation or line;

(3) to drive any vehicle except in the proper lane provided for that purpose and in the proper direction and to the right of the central dividing curb, separation section or line;

(4) to drive any vehicle into the controlled access facility from a frontage road except through an opening provided for that purpose in the dividing curb or dividing section or dividing line which separates such frontage road from the controlled access facility proper.

Any person who violates any of the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than five dollars ($5) nor more than one hundred dollars ($100), or by imprisonment in the city or county jail for not less than ten (10) days nor more than thirty (30) days, or by both such fine and imprisonment [L. 1953, ch. 307, § 6; April 2].

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 165

R. E. RAY and SADIE RAY,
His Wife,
Petitioners,

vs

STATE HIGHWAY COMMISSION
OF KANSAS,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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vs.

STATE HIGHWAY COMMISSION
OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The questions presented, as contained in the petition, beg the question in that they assume that the construction by respondent of a frontage road abutting petitioners' property resulted in a taking of petitioners' property right of access, and question if such can be done without payment of just compensation. Respondent believes the issues pertinent to the grant of certiorari are as follows:

1. Does the decision of the highest court of a state declaring that owners of land abutting a controlled access public highway possess a property right only to reasonable, but not unregulated, access to the highway, thus defining the extent of the common-law property right existing under state law, present a federal question?

2. Does the police power of the state extend to the reasonable regulation of direct access to a controlled access public highway by affording abutting landowners unlimited access to a frontage road adjacent to their property which connects to the through, high-speed traffic lanes at points 155.56 feet and 714 feet from their property lines?

STATEMENT OF THE CASE

All material facts are stated in the opinion of the Supreme Court of Kansas (App. of petition, p. A9), and were undisputed. Petitioners own a tract of land abutting U.S. Highway No. 54 west of Wichita, Kansas, on the north. In 1952, the respondent condemned an easement for highway right-of-way over petitioners' land and in 1953 constructed a divided, four-lane highway within the easement. Petitioners were afforded unlimited and unregulated access to the westbound traffic lanes abutting their property. In 1959, respondent constructed within the easement condemned in 1952 and as a part of U.S. 54 additional highway lanes, commonly known as a frontage road, abutting petitioners' property. Respondent constructed the frontage road for the purpose of making U.S. Highway No. 54 safer, less dangerous, and for the welfare of the people, following a study and recommendation by its safety department. Since construction of these additional lanes, petitioners have been afforded unlimited and unrestricted access to these lanes, but have been limited in access to the inner, through-traffic, high-speed, westbound lanes to

the points where the frontage road connects to these lanes. These points of connection are 1067.44 feet apart, being located 155.56 feet and 714 feet from petitioners' property lines.

Petitioners, believing that the construction of the additional highway lanes and the action of the respondent in limiting access of their property to the inner, high-speed, through-traffic lanes to the points where the frontage road connects with these lanes resulted in a taking of their common-law property right of access, brought suit against respondent to recover the value of the property rights allegedly taken. On the basis of admitted facts in the pleadings and admissions of fact secured by the respondent, stated above, the trial court entered summary judgment for the respondent. On appeal, the Supreme Court of Kansas affirmed the judgment, holding as a matter of law that upon the admitted facts no property rights of the petitioners had been taken by the respondent and they are not entitled to compensation.

ARGUMENT

I. The Nature and Extent of the Common-Law Property Right of Access to a Public Highway Possessed by Owners of Land Abutting the Highway Is a Matter of State Law, and the Definition of the Property Right by the Highest Court of a State Presents No Federal Question.

The holding of the Supreme Court of Kansas in this case is stated in the syllabus. (App. of petition, p. A7). The Court held that the right of access of an abutting property owner to a public street or highway is merely a right to reasonable, but not unlimited, access to and from the highway. As applied to controlled access facilities, where a frontage road is provided, to which the abutting owners

of property have direct access, and they have reasonable access from the abutting property via the frontage road to the through-traffic lanes of the controlled access highway, the abutter's rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state, and their damages, if any, are noncompensable. In so holding, the Court followed the law of its decision in *Brock* v. *State Highway Commission*, 195 Kan. 361, 404 P.2d 934, where the Court defined the common-law right of access to a controlled access public highway as follows:

> "The common-law rules relating to rights of access were adopted for application to conventional highways such as land-service, farm-to-market and ordinary highways, to meet local transportation needs, as distinguished from interstate highways, freeways and other thoroughfares which were not then known and which require controlled access facilities for public safety and convenience.
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> "The common-law rules relating to highway access rights were adaptable to circumstances and left to capacity for growth. The doctrine granting access rights to owners of abutting land as developed for conventional highways does not have the same application to controlled access thoroughfares.
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> "Although an abutting landowner has a right to use a highway, he cannot be heard to say that he has been deprived of his right of access or compensably damaged because he does not have direct access to the through-traffic lanes of an access controlled highway where public judgment dictates that access to and from the highway should be controlled and is subject to control under the police power of the state.

> "Circuity of travel, necessarily and newly created, to and from real property, does not of itself result in legal impairment of the right of ingress and egress to and from such property and a controlled access highway.
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> "An owner of land has no right to the continuation of a flow of traffic in front of his property from an access controlled thoroughfare and the state may abandon, reroute, or otherwise divert traffic without any liability to the owner of abutting lands."

What the Supreme Court of Kansas has done in the instant case and in the case of *Brock* v. *State Highway Commission*, supra, is to define the common-law property right of access to a controlled access highway in Kansas to be a right to reasonable, but not unregulated or unrestricted, access to the highway. The Court found on the facts of the instant case that petitioners have reasonable access to and from the public highway abutting their property, and therefore no property right under the law of Kansas has been taken. It is within the power of the highest court of a state to declare the common law of that state, and the definition of common-law state rules of property presents no federal question in a case where petitioners claim no rights under any federal law. This fundamental principle of federalism was expressed in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194, 58 S. Ct. 817, wherein this Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in the statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State

whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 401, 37 L. ed. 772, 786, 13 S. Ct. 914, against ignoring the Ohio common law of fellow servant liability: '. . . But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'"

This Court has held the decisions of the highest court of a state on matters of state substantive law to be conclusive upon this Court and other federal courts. *Huddleston v. Dwyer*, 322 U.S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015; *Guarantee Trust Co. v. York*, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464.

Petitioners call attention to the diverse conclusions reached by the courts of the various states in access cases. They ask this Court, through exercise of its certiorari power, to end the variance in state court decisions. The certiorari jurisdiction of this Court does not exist to standardize the law of the various states on matters of local property rights not involving federal law.

Petitioners claim that respondent failed to exercise its statutory power to *acquire* access rights by gift, devise, purchase or condemnation (K.S.A. 68-1903) and apparently claim that failure of the respondent to acquire their access rights under this statute deprived them of a federal right. They ignore the interpretation of this state statute by the Kansas Supreme Court, which held that the statute in no way attempted to restrict the state's existing right to control access under the police power, but rather was intended to give authority to respondent to take rights of access in their entirety. *Brock* v. *State Highway Commission*, 195 Kan. 361, 369, 404 P.2d 934. They further ignore the fact that they continue to enjoy access to the highway abutting their property. Their access rights have not been taken in their entirety and their property landlocked. They have full access to the frontage road and access to the inner lanes of the highway via the frontage road, which the Kansas Supreme Court has held constitutes the extent of their property right of access. Petitioners refuse to acknowledge the clear distinction between a "taking" of property and the regulation of its use, and refuse to accept the state common-law definition of that property right as one of reasonable but not unregulated access to an abutting highway.

Petitioners further contend that they have been denied procedural due process because they have not been afforded an inquiry into the facts of this case. They ignore the fact that this action for the recovery of damages has been pending in the courts of Kansas for five years, they had full opportunity for discovery of facts and litigation of the issues under the civil procedure, their petition and admitted facts have been fully considered by the courts, and their claim found to be without merit.

II. The Police Power of a State Clearly Extends to the Regulation of Direct Access to a Controlled Access Highway by Affording Abutting Landowners Unlimited Access to a Frontage Road Adjacent to Their Property Which Connects to the Through, High-Speed Traffic Lanes at Points 155.56 Feet and 714 Feet from Their Property.

While the right of access is a property right under the law of Kansas, it, like all property rights, is subject to reasonable regulation in the interest of public safety. Reasonable regulation of the use of property under the police power is not conditional upon payment of compensation. This fundamental principle, stated in *Mugler* v. *Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273, was restated by this Court in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 593, 8 L. Ed. 2d 130, 133, 82 S. Ct. 987, as follows:

> "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

The *Goldblatt* case goes on to state that regulation carried too far becomes a taking for which compensation must be paid. But surely the regulation of the right of access in the case at bar, which allows petitioners unlimited access to the highway lanes abutting their property, but limits petitioners' access to the inner, high-speed, through-traffic lanes via the frontage road to points only 155.56 feet and 714 feet from their property lines, does not go too far. Petitioners only must travel a more circuitous route to reach the inner lanes.

This exercise of police power is valid within the test stated in the *Goldblatt* case, wherein it is stated:

> "The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499 (1894), is still valid today:
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> 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" (l.c. page 594).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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